

NO. PD-711-17

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

MARIAN FRASER

v.

THE STATE OF TEXAS

From the Austin Court of Appeals
Cause No. 03-16-00060-CR

**APPELLANT'S REPLY TO THE STATE'S
PETITION FOR DISCRETIONARY REVIEW**

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ORAL ARGUMENT REQUESTED

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Statement Regarding Oral Argument

Appellant asks the Court to refuse the State's petition for discretionary review. However, if the Court grants the petition, Appellant requests the opportunity to appear and present oral argument both on the issues addressed in the State's petition and also in Appellant's cross-petition.

Reply to Question Presented for Review

1. Reckless or criminally negligent injury to a child or child endangerment cannot be used as the underlying felony for a felony-murder prosecution alleging murder by injury to a child or by child endangerment.

Reasons for Granting Review

The State challenges that the Amarillo Court's decision that reckless or criminally negligent injury to a child or child endangerment cannot serve as the underlying felony in a felony-murder prosecution premised on one of those felonies. Appellant explains briefly in this reply why the State's contentions are without merit and asks the Court to refuse the State's PDR.

However, Appellant has filed a cross-PDR raising issues about the jury charge in a felony-murder prosecution. If the Court grants the State's PDR, then Appellant urges the Court to also grant her cross-PDR because the issues raised will afford the Court the opportunity to address not only some fact-specific applications of the felony-murder statute when the underlying felony is injury to a child but also some broader applications that will apply in most felony-murder prosecutions.

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Argument

1. **Reckless or criminally negligent injury to a child or child endangerment cannot be used as the underlying felony for a felony-murder prosecution premised on one of those felonies.**

The Amarillo Court essentially held that reckless or criminally negligent injury to a child or child endangerment cannot serve as the underlying felony in a felony-murder prosecution premised on one of those felonies. The State's PDR challenges several of the rationale that court relied on for its conclusions. The State also suggests that the Amarillo Court's decision conflicts with the decisions of other intermediate appellate courts that have endorsed what the Amarillo Court condemned.

In this reply, Appellant shows why the State's challenges are unfounded. Further, the parties in the other (purportedly conflicting) decisions cited by the State did not challenge the use of reckless or criminally negligent acts to support a felony-murder prosecution and those courts did not address that issue.

- A. **A felony-murder prosecution cannot be premised on manslaughter or a lesser-included offense of manslaughter.**

Section 19.02(b)(3) of the Penal Code defines the offense of felony murder as the commission or attempted commission of "a felony, other

than manslaughter” during which the actor commits “an act clearly dangerous to human life that causes the death of an individual. TEX. PEN. CODE § 19.02(b)(3).

Because the statute on its face excludes manslaughter as an underlying felony, this Court has held that “a conviction for felony murder under section 19.02(b)(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter.” *Lawson v. State*, 64 S.W.3d 396, 397 (Tex. Crim. App. 2001) (quoting *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999)).

B. The required culpable mental state for felony murder is defined by the underlying felony.

Before addressing what might be a lesser-included offense of manslaughter, it is important to respond to the State’s incorrect assertion that “felony-murder has no culpable mental state.”

The felony-murder statute does plainly dispense with a culpable mental state as to the “act of murder.” *Lomax v. State*, 233 S.W.3d 302, 307 (Tex. Crim. App. 2007); *see* TEX. PEN. CODE § 6.02(b). But it does not dispense with a culpable mental state as to the underlying felony.

For over 40 years, this Court has observed that the required culpable mental state for felony murder is supplied by the underlying felony. *E.g.*, *Ex parte Easter*, 615 S.W.2d 719, 721 (Tex. Crim. App. 1981); *Rodriguez v. State*, 548 S.W.2d 26, 28-29 (Tex. Crim. App. 1977); *Hilliard v. State*, 513 S.W.2d 28, 33 (Tex. Crim. App. 1974). This is nothing more than a specific application of the principle of transferred intent. *See Richard v. State*, 426 S.W.2d 951, 954-55 (Tex. Crim. App. 1968) (op. on reh'g).

But this Court confronted a new wrinkle in *Lomax* when asked to decide whether felony DWI may serve as the basis for a felony-murder charge because DWI does not have a culpable mental state.

The Court re-affirmed the settled principle that the statute defining the underlying felony “determines whether the underlying felony requires a culpable mental state.” *Lomax*, 233 S.W.3d at 307. Because section 49.11 also plainly dispenses with a culpable mental state for DWI, then a felony murder prosecution premised on felony DWI likewise requires no culpable mental state. *Id.*

Regardless, *Lomax* re-affirmed that, if the underlying felony proscribes a certain culpable mental state, then the State must prove that culpable mental state to obtain a conviction for felony murder.¹

C. Reckless and criminally negligent injury to a child are lesser-included offenses of manslaughter under this indictment.

The Court employs a 2-step analysis to determine whether an offense is a lesser-included offense. The first step focuses on the statutory elements of the charged offense as modified by the specific allegations of the indictment.

[I]f the indictment for the greater-inclusive offense either: 1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced. Both statutory elements and any descriptive averments alleged in the indictment for the greater inclusive offense should be compared to the statutory elements of the lesser offense. If a descriptive averment in the indictment for the greater offense is identical to an element of the lesser offense, or if an element of the lesser offense may be deduced from a descriptive averment in the indictment for the greater-inclusive offense, this should be factored into the lesser-included-offense analysis in asking

¹ Appellant contends in her cross-PDR previously filed that the conduct element(s) applicable to the underlying felony necessarily apply to a felony-murder charge. *See* Appellant's Cross-PDR at 6-8. Thus, if the underlying felony is a result-oriented offense, then the felony-murder charge is likewise result-oriented.

whether all of the elements of the lesser offense are contained within the allegations of the greater offense.

Ex parte Watson, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (per curiam) (op. on reh'g) (footnotes omitted).

Some courts have held that injury to a child is not a lesser-included offense of manslaughter (or murder) because these latter offenses do not have an age requirement whereas injury to a child requires a victim who is 14 or younger. *E.g.*, *Hopper v. State*, No. 03-03-00508-CR, 2004 WL 2108665, at *6 (Tex. App.—Austin Sept. 23, 2004, pet. ref'd) (mem. op., not designated for publication). And this Court has stated without elaboration that injury to a child is not a lesser-included offense of manslaughter. *Johnson*, 4 S.W.3d at 258. But it is unclear from the opinion in *Johnson* whether the indictment alleged all 4 culpable mental states or just intentional and knowing conduct. *Cf. Lawson v. State*, 64 S.W.3d 396, 397 (Tex. Crim. App. 2001) (holding that intentional or knowing aggravated assault is not a lesser-included offense of manslaughter in felony-murder prosecution).

Conversely, several courts have observed that injury to a child is a lesser-included offense of capital murder when the victim is alleged to be a

child.² *Paz v. State*, 44 S.W.3d 98, 101 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d); *In re L.M.*, 993 S.W.2d 276, 283 & n.8 (Tex. App.—Austin 1999, pet. denied); *see also Lucio v. State*, 351 S.W.3d 878, 896 n.19 (Tex. Crim. App. 2011) (holding that *L.M.* “is arguably correct”); *Hudson v. State*, 415 S.W.3d 891, 896 (Tex. App.—Texarkana 2013) (holding that felony murder based on injury to child is lesser-included of capital murder of child), *aff’d*, 449 S.W.3d 495 S.W.3d (Tex. Crim. App. 2014).

Here, Count I, Paragraph I of the indictment alleges that Appellant committed felony murder during the commission of the offense of injury to a child. (CR6) Thus, the State alleged that Appellant caused the death of a child 14 or younger. *See* TEX. PEN. CODE § 22.04(c)(1). Because the indictment alleges a victim 14 or younger, the principle explained in *Hopper* does not apply. *Cf. Hopper*, 2004 WL 2108665, at *6. Rather, because the descriptive averments of the indictment allege a victim 14 or younger, the principle explained in *Paz* and similar capital murder cases applies. *See Paz*, 44 S.W.3d at 101; *L.M.*, 993 S.W.2d at 283; *see also Lucio*, 351 S.W.3d at 896 n.19; *Hudson*, 415 S.W.3d at 896.

² *See* TEX. PEN. CODE § 19.03(a)(8).

Because the indictment alleges a child victim 14 or under, the Amarillo Court was correct to say that reckless or criminally negligent injury to a child is a lesser-included offense of manslaughter. *See Watson*, 306 S.W.3d at 273.

D. Reckless and criminally negligent child endangerment are lesser-included offenses of manslaughter under this indictment.

The Tyler Court has held similarly to *Hopper* that child endangerment is not a lesser-included offense of manslaughter because the latter does not require proof of the victim's age. *Hurst v. State*, No. 12-07-00060-CR, 2008 WL 2814819, at *2 (Tex. App.—Tyler July 23, 2008, no pet.) (mem. op., not designated for publication).

But Count I, Paragraph II of the indictment alleges that Appellant committed felony murder during the commission of the offense of child endangerment. (CR6) Thus, the State alleged that Appellant caused the death of a child younger than 15. *See* TEX. PEN. CODE § 22.041(c). Because the indictment alleges a victim younger than 15, *Hopper* does not apply. *Cf. Hopper*, 2004 WL 2108665, at *6. Rather, the principle explained in *Paz* and similar capital murder cases applies. *See Paz*, 44 S.W.3d at 101; *L.M.*, 993

S.W.2d at 283; *see also Lucio*, 351 S.W.3d at 896 n.19; *Hudson*, 415 S.W.3d at 896.

Because the indictment alleges a child victim younger than 15, the Amarillo Court was correct to say that reckless or criminally negligent child endangerment is a lesser-included offense of manslaughter. *See Watson*, 306 S.W.3d at 273.

E. The cases relied on by the State did not address the issue presented.

The State cites a number of cases in Part e of its PDR that have purportedly “recognized” that reckless or criminally negligent injury to a child or child endangerment can support a felony-murder conviction. It is true that the allegations in these cases included recklessness and criminal negligence. But the appellants in those cases did not present the arguments raised here by Appellant and only one of them arguably challenged the inclusion of these culpable mental states as a basis for prosecution, albeit for a different reason.

Although not cited in Part e of the State’s PDR, the State refers to this Court’s decision in *Contreras* in Part c as approving a felony-murder prosecution premised on injury to a child committed intentionally,

knowingly, recklessly or with criminal negligence. *See* State's PDR at 9 (citing *Contreras v. State*, 312 S.W.3d 566, 583-84 (Tex. Crim. App. 2010)). But the appellant in *Contreras* contended that the jury charge violated his right to a unanimous verdict—a different issue than presented here. *Contreras*, 312 S.W.3d at 583.

In *Tata*, the court rejected a contention that a felony-murder indictment premised on reckless injury to a child must allege the acts relied on to constitute recklessness under article 21.15—a different issue than presented here. *See Tata v. State*, 446 S.W.3d 456, 462-64 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).

In *Ebong*, the court rejected a contention that the appellant was entitled to submission of a lesser-included charge for injury to a child—a different issue than presented here. *See Ebong v. State*, No. 14-14-00070-CR, 2015 WL 1632713, at * (Tex. App.—Houston [14th Dist.] Apr. 9, 2015, pet. dismiss'd, untimely filed) (mem. op., not designated for publication).

In *Smith*, the court rejected a contention that a felony-murder charge premised on injury to a child should not authorize conviction for criminally negligent conduct because the Pattern Jury Charge does not—a different issue than presented here. *See Smith v. State*, No. 04-13-00771-CR,

2014 WL 7357530, at *9 (Tex. App.—San Antonio Dec. 23, 2014, no pet.) (mem. op., not designated for publication).

In *Jimenez*, the court approved injury to a child as the underlying felony in felony-murder prosecution including intentional, knowing or reckless conduct. See *Jimenez v. State*, No. 11-11-00201-CR, 2013 WL 1281846, at *1-2 (Tex. App.—Eastland Mar. 28, 2013, pet. ref'd) (mem. op., not designated for publication). But the court did not address the issue presented here.

Accordingly, while these cases are arguably inconsistent with the arguments presented by Appellant, the parties and courts there did not address the arguments presented here.

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellant Marian Fraser asks the Court to: (1) refuse the State's petition for discretionary review; and (2) grant such other and further relief to which she may show herself justly entitled.

Respectfully submitted,

/s/ Alan Bennett

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Certificate of Compliance

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this computer-generated document contains 2,838 words.

/s/ Alan Bennett
E. Alan Bennett

Certificate of Service

The undersigned hereby certifies that a true and correct copy of this petition was served electronically on August 24, 2017 to: (1) counsel for the State, Debra Windsor, CCAappellatealerts@tarrantcountytexas.gov; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett
E. Alan Bennett